

From the Second Generation Committee Newsletter, Vol. 2, No. 1, September 2001, a publication of the Section of Environment, Energy, and Resources, American Bar Association. © 2001 American Bar Association.

## **GREEN TIER: WISCONSIN'S SECOND GENERATION APPROACH**

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Wisconsin's Department of Natural Resources (DNR), once again, is leading the way with proposed second generation legislation called Green Tier. The legislation is the consensus initiative of the Green Tier Advisory Committee formed during former Secretary George Meyer's tenure. It is a stakeholder group composed of 15 members from government, farm, business and the NGO communities. The result is an innovative approach to the green and brown issues facing our society. It incorporates the CERES Principles, particularly stakeholder engagement. The implementation of ISO 14000 and like environmental management systems also are encouraged to further Green Tier goals.

Mark McDermind, Bureau Director of DNR's Cooperative Environmental Assistance Bureau - the Bureau that will manage Green Tier if it is passed - has fielded calls from other states, business groups, environmental interests and foreign countries interested in Green Tier. DNR has a web site with background papers, specific applications and statutory language. (See [www.dnr.state.wi.us](http://www.dnr.state.wi.us) and scroll to "Green Tier" on the topics menu.)

The legislation establishes a two-tier approach to attaining and sustaining superior environmental performance. Superior environmental performance, a term that has proven illusive on the national environmental scene, is defined as "measurable or discernible improvement in the quality of air, water, land or natural resources or in the protection of the ecosystem beyond that which is achieved under current environmental requirements."

The legislation suggests some superior environmental performance examples, other than beyond compliance. They include: "restoring, reclaiming, enhancing, or preserving natural resources"; "reduces waste or hazardous or toxic materials in the design, production delivery, use of reuse of goods and services"; "conserves energy or non-renewable natural resources"; and "reduces its use of renewable natural resources through more efficient and sustainable methods." Building on the CERES Principles, Green Tier recognizes that organizations can contribute to the environment by providing mentoring, technical assistance or management skills and services to others. McDermid said this recognition invites supply chain environmental management that benefits small businesses.

### **Green Tier 2**

Green Tier 2 is the leadership tier. Applicants for Green Tier 2 status must have an established environmental management system (EMS) and be free of substantial violations of criminal convictions for the previous ten years, civil judgments for the previous five years, and DOJ and DNR suits to enforce any environmental requirement for the previous 2 years. The Green Tier 2 process begins when the applicant submits a letter of

intent to DNR. The proposed legislation enumerates what must be included in the letter of intent. The applicant must demonstrate that it has implemented an EMS for each Green Tier facility or activity based on ISO standards or a standard DNR determines is functionally equivalent. The applicant must commit to an approved DNR environmental auditor doing an environmental audit of the EMS on an annual basis and submitting an EMS annual report to DNR. An audit of compliance of environmental requirements is also required and must be submitted to DNR annually. The applicant and DNR enter into an enforceable contractual agreement once the applicant is accepted into the program. Other parties may sign the contract, with DNR approval, opening the door to regulated and unregulated partners engaging in pollutant reduction, environmental restoration or pollution prevention agreements.

One of the more innovative stakeholder aspects of the process is the inclusion of the public to participate in contract negotiations. Within 30 days after DNR provides the public of notice of the submitted letter of intent, interested persons may request permission from DNR to participate in the contract negotiations. If DNR determines that the person demonstrates "sufficient interest and ability to participate in the issues raised by the letter of intent," DNR can grant them participation in the negotiations. Environmentalists may be funded to negotiate contracts. Another innovative stakeholder aspect of the proposed legislation is the ability of an interested third party to ask DNR to terminate a Green Tier contract. The proposed legislation has numerous timelines so that nobody - DNR, the applicant or the public - is left hanging.

One of the trickier parts of the contract negotiations will be the incentives that are "proportional to the environmental benefits" to be provided to the participant for making a Green Tier 2 commitment. The proposed legislation does not enumerate what these incentives will be. This is a gutsy move for DNR. It leaves the door open for all parties to negotiate significant incentives and significant superior environmental performance. This is the step with a huge win/win potential no federal or state governmental entity has had the courage to take on. Presently, federal and state governments are reluctant to convert regulatory requirements into stretch goals, which was attractive to advisory committee environmentalists.

The intent of Tier 2 is to get beyond the quid pro quo incentives, however, to create what McDermid calls a culture of environmental enterprise, whether it be applied to a specific area, such as a zone, or problem, such as a persistent contaminant. Tier 2 also opens the door to dealing with environmental, social and economic goals, and issues and values in tandem rather than through political and legal conflict. Two examples are the creation of enterprise zones tied to urban revitalization in a brownfield cluster (e.g., the Menomonee Valley in Milwaukee) and agriculture-landscape regions that achieve TMDL goals and habitat protection (blending the green and brown).

This contractual approach substitutes learning for litigation. The contracts are to be place-based management and adaptive based on the needs of the parties around the table. The contracts will last as long as ten years. This time frame will allow businesses to integrate environmental stretch goals into their normal business cycle plans for environmental and non-environmental capital expenditures rather than arbitrary regulatory time lines. DNR, the Green Tier Council and Green Tier participants, in collaboration with the University of Wisconsin's prestigious La Follette School of Public Affairs, will collect and synthesize the data necessary to substantiate the continuous improvement aspect of stretch goals. If participants do not meet contractual goals, DNR may terminate their participation in the program.

## **Green Tier 1**

A Green Tier 1 applicant, like a Green Tier 2 applicant, can be one entity or a group of entities. The applicant's environmental enforcement record requirement is less rigorous than Tier 2. Green Tier 1 requires 5 years free of criminal convictions, three years free of civil judgments and two years free of DOJ and DNR environmental suits. The application must describe past, current and future environmental performance activities.

The applicant must have implemented an EMS or commit to implementing an EMS within one year of the application. The Green Tier 1 EMS is based on the same standards required by Green Tier 2. A performance progress report must be submitted annually. An annual EMS audit is required, with every third audit performed by an outside auditor approved by DNR. An annual audit report must be submitted to DNR annually and must report all violations found by the audit. All violations must be corrected in 90 days or within a negotiated compliance schedule.

The Green Tier 1 process is simpler than Tier 2 in that DNR approves or denies the application within 60 days of providing public notice or 120 days after public notice and a discretionary public meeting. Unlike Green Tier 2, Green

Tier 1 incentives are specifically enumerated in the proposed legislation. Most of the incentives are "good corporate citizen" kudos, however. DNR inspections will be conducted "at the lowest frequency permitted" once the EMS is implemented. Of course, the legislation allows for an inspection whenever DNR has reason to believe the entity is out of compliance with a requirement.

Green Tier 1 opens the door to changes in how regulator and regulated entity relate to each other. Green Tier 2 is a model for mutual engagement and contains the legal framework for civic environmentalism as discussed by the National Academy of Public Administration. Participants in both tiers are eligible for the Green Tier logo.

### **Deferred Civil Enforcement**

One of the biggest incentives for regulated entities to become part of the Green Tier program is the deferred civil enforcement provision. If violations are discovered during an environmental audit, disclosed to DNR and corrected within 90 days of the date of the audit or within an agreed upon compliance schedule, the state may not commence a civil action to collect penalties. (The DNR assumes that the entity intends to legally comply by virtue of the EMS, which can be designed as a legally-viable due diligence tool.) However, if the compliance schedule is not adhered to, DNR may terminate participation in the program and commence a civil action. If the entity commits violations that meet the serious harm to public health or environment threshold or DNR discovers the violations before submission of the audit, a civil action may be commenced at any time.

### **Green Tier Charters**

Another innovative tool in the legislation is the Green Tier Charter. McDermid describes the Green Tier Charters as necessary to establish the green enterprise zones. The charters will be issued to "an association of public or private entities or a combination of public and private entities to encourage their participation in Tier I or Tier II of the Green Tier Program." Chartered entities may be organized along business sector lines, product lines, supply chains, geographic locations, watersheds or biological or scientific concept, or any basis necessary to achieve superior environmental performance. The charters will be not less than three years and not more than 10 years in duration. If DNR determines that the group has the resources to accomplish the charter, public notice is given and a public information meeting is held. An annual report is required. The charter may be terminated based on substantial noncompliance with the charter.

## **Records**

The public will have access to all records generated by the Green Tier participants except for trade secret documents.

## **Green Tier Council**

The legislation creates a 15-member Green Tier Council. After the successful preliminary work of the existing Green Tier Advisory Committee, evidenced by the proposed legislation, it seems natural that an advisory group would be formally established. The Governor will appoint members who will be from environmental organizations, businesses, local government units and other relevant groups. The council will advise DNR on the implementation of the Green Tier. Two of the other major undertakings will be advising DNR on the content of an annual list of superior environmental performance aspects and the assessment of proportionality between incentives and superior environmental performance.

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